

**Delta Stewardship Council**  
**Legal Update**  
**March 22, 2018**

**1. *California Water Curtailment Cases***

On February 21, 2018, Santa Clara Superior Court Judge Brian Walsh addressed the legality of water curtailment notices sent in 2015 by the State Water Resource Control Board (“Water Board”) and resolved Phase I of eight lawsuits brought by water districts coordinated as California Water Curtailment Cases (JCCP No. 4838). Even though the issue is technically moot, as the Water Board rescinded the curtailment notices and dismissed its enforcement actions, the court exercised its discretion under a public interest exception to discuss the Water Board’s enforcement authority over pre-1914 and riparian water rights to provide guidance on this controversial issue in anticipation of California’s next major drought.

Although not dispositive of whether the Water Board may enforce these water rights in all circumstances,<sup>1</sup> the court held the Water Board acted without authority when it issued curtailment notices in 2015 under Water Code section 1052 to pre-1914 appropriators. The court reasoned pre-1914 rights fall outside the statute’s scope because the enforcement authority granted to the Water Board under section 1052 is for “diversion or use of water subject to this division other than as authorized in this division...” and the water rights in issue were not “authorized” by the Water Board under the Water Code but rather pre-date it.

The curtailment notices were further found to violate due process because the Water Board failed to provide for notice and opportunity to be heard with regards to its underlying findings prior to its issuance curtailment notices in 2015. The Water Board argued that the notices were advisory but the court emphasized: “[t]he curtailment notices unequivocally ordered petitioners to stop using water at the time of their issuance or risk large fines” holding even “temporary deprivation of water rights are subject to the requirements of due process.”

Phase II and III involve takings claims and are still pending before the Santa Clara County Superior Court.

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<sup>1</sup> Whether the Water Board has power to enforce under the public trust doctrine or inherent police powers of the State was not in issue; however, the court took notice that in 2014 the legislature amended Water Board Water Code 1058.5, which authorizes the Water Board to adopt emergency regulations, to include curtailment when water is not available under the diverters priority of right. JCCP No. 4838 (Feb. 21, 2018) Statement of Decision Phase I Trial at p. 31, fn. 12.

## **2. *County of Sacramento et al v. State Water Resources Control Board***

The State Water Resources Control Board (“Water Board”) received multiple motions early this year to delay Phase 2 of ongoing hearings on a water right change permit for a two-tunnel water conveyance project (“WaterFix”) proposed in the delta. The first motions sought to delay the hearings until it could be determined whether alleged ex parte communications had occurred and, if so, what impact they would have on the process. Just days after these initial motions, the Department of Water Resources (“DWR”) announced that Central Valley and Southern California water agencies would not commit to the cost of the two-tunnel project as proposed. DWR stated that a staged approach would be considered to allow the project to move forward with one tunnel and add a second tunnel at a later date. Based on this new information, motions were again filed with the Water Board to postpone Phase 2 of the hearings on the change permit sought for WaterFix. Petitioners this time argued the proposed changes to WaterFix were significant and new or modified hearings, based on a single-tunnel project, were required. The Water Board canceled two weeks of hearings to consider the impact of potential changes to the project on the hearing process.

On February 21, the Water Board ruled Part 2 of the change petition hearings on WaterFix should continue. The Water Board ruling states that petitioners “have not yet communicated a decision to proceed with the WaterFix Project in stages.” Because there has not been a change to the project, the Water Board found no need “to grant a stay and modify the procedures for this hearing to accommodate that possibility.” The ruling did note, however, if petitioners decide to change the proposed project to include staged implementation of WaterFix, “DWR has indicated its intent to prepare a supplemental EIR.”<sup>2</sup> The Water Board ruling further addressed earlier motions to postpone the hearings over alleged ex parte communications between the Water Board and DWR. The Water Board found no ex parte communications had occurred because only Water Board staff had communicated with DWR. According to the Water Board, staff are not hearing officers prohibited under the Administrative Procedure Act from communications with DWR. Furthermore, communications that occurred in preparation

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<sup>2</sup> According to the Water Board ruling, DWR has committed to (1) inform all parties; (2) introduce the EIR supplement and testimony that addresses whether it is necessary to revisit hearing issues in light of the staged implementation; and (3) make its witnesses available for cross-examination by the parties.

of the EIR on Waterfix were appropriate given the Water Boards role as a responsible agency under CEQA and DWR's role as the lead agency

On February 27, 2018, the Water Board's ruling on its alleged ex parte communications was challenged in the Sacramento Superior Court with a writ of mandate for a court order that would require the Water Board to take action to remedy all ex parte communications.<sup>3</sup> Petitioners also seek preliminary and permanent injunctions pending the courts determination on the writ. On March 5, 2018, Judge James P. Arguelles denied petitioners initial request for a temporary restraining order. A hearing on the writ is scheduled for May 25, 2018. At this time, the Water Board's ruling on the motions for a stay of the change petition hearings due to a changes to the WaterFix project has not been challenged in the courts.

### **3. Delta Stewardship Council: Administrative Procedures Governing Appeals**

An appeal to the Stewardship Council triggers ex parte communication restrictions on the Council and its members under California's Administrative Procedure Act.<sup>4</sup> These restrictions strive to preserve a transparent hearing process and requires notice and opportunity for all interested parties to participate in communications related to any issue in the pending appeal between an interested party and Council members.<sup>5</sup>

While an appeal is pending, from the day it is filed until the Council reaches a final decision, Council members should not communicate with a party to the appeal or other potentially interested persons outside the Stewardship Council on any issue related to the appeal.<sup>6</sup> However, if a Council member receives a communication related to an issue in the pending appeal, they should notify Bethany Pane, Andrew Tauriainen in her absence, or Jessica Law so that appropriate action may be taken.<sup>7</sup> When an appeal is anticipated, legal may recommend that the Council implement these ex parte restrictions as early as the completion of early consultation and no later than the filing date for certification of consistency. Legal will remind the Council of the ex parte

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<sup>3</sup> Specifically petitioners seek an order that that the Water Board (a) disclose all ex parte communications, (b) allow parties to conduct discovery and comment and present evidence concerning the subject matter of these communications, and (c) disqualify Hearing Team members that have engaged in ex parte communications for the remainder of the hearings.

<sup>4</sup> Delta Stewardship Council: Administrative Procedures Governing Appeals, ¶ 26 [adopting the California Administrative Procedure Act (APA) Gov. Code § 11430.10 et seq. pursuant to authority provided by Water Code section 85225.30].

<sup>5</sup> Gov. Code § 11430.10 (a).

<sup>6</sup> Gov. Code § 11430.10 (c).

<sup>7</sup> Admin. Proc. Governing Appeals, ¶ 27.

restrictions and answer any questions at the first appropriate meeting once an appeal is anticipated.<sup>8</sup>

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<sup>8</sup> Admin. Proc. Governing Appeals, ¶ 28.